No. 80-993

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

GENE PATTERSON, *et al.*, and J. P. STEVENS EMPLOYEES EDUCATION COMMITTEE, INC.,

*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, and AMALGAMATED CLOTHING AND TEXTILE WORKERS UNION, AFL-CIO, CLC,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION


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## MEMORANDUM FOR THE RESPONDENT UNION IN OPPOSITION

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### REASONS FOR DENYING THE WRIT

**I. There Is No Conflict Among The Circuits Or Other Justification For Review By This Court.**

A. The decision below is an entirely routine and correct application of Congress' restriction of the jurisdiction of the federal district courts to review the actions of the National Labor Relations Board in proceedings under

§ 9 of the National Labor Relations Act ("NLRA"). Petitioners' effort to bring themselves within the carefully drawn and deliberately narrow exception of *Leedom* v. *Kyne*, 358 U.S. 184, is wholly without merit, as both courts below recognized (Pet. 36-37; 40-42).[1] Nowhere in the lengthy and tendentious petition is there any demonstration that the Board "has clearly acted in excess of its delegated powers and contrary to a specific prohibition in the Act", which is the prerequisite for jurisdiction under *Kyne*, *id.* at 188.

In attacking the Board's long-settled "blocking charge" rule, petitioners attempt to contrive a conflict between the decision below and two decisions of the Fifth Circuit, *Templeton* v. *Dixie Color Printing Co.*, 444 F.2d 1064 (C.A. 5) and *Surratt* v. *N.L.R.B.*, 463 F.2d 378 (C.A. 5). See particularly the extensive quotations from *Templeton* at Pet. 17-20; 29-32. However, as the Fifth Circuit itself subsequently explained, the *Templeton* and *Surratt* cases turned on their own special facts, namely, that the underlying unfair labor practice proceedings which had blocked the representation petition had been pending so long that they were stale; accordingly the Fifth Circuit itself refused to hold the "blocking charge" rule to be illegal *per se* and subject to review by the district courts in a *Leedom* v. *Kyne* action. *Bishop* v. *N.L.R.B.*, 502 F.2d 1024, 1030-1032.[2] (C.A. 5).

Indeed, the *Bishop* court approved the "blocking charge" rule, saying in part:

> If the employer has in fact committed unfair labor practices and has thereby succeeded in undermining union sentiment, it would surely controvert the spirit of the Act to allow the employer to profit by

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[1] "Pet." refers to the Petition for Certiorari.

[2] *Templeton* and *Surratt* were described as "a very limited exception to the general rule of review of representation questions". (*Id.* at 1032).

his own wrongdoing. In the absence of the "blocking charge" rule, many of the NLRB's sanctions against employers who are guilty of misconduct would lose all meaning. Nothing would be more pitiful than a bargaining order where there is no longer a union with which to bargain.

Nor is the situation necessarily different where the decertification petition is submitted by employees instead of the employer or a rival union. Where a majority of the employees in a unit genuinely desire to rid themselves of the certified union, this desire may well be the result of the employer's unfair labor practices. In such a case, the employer's conduct may have so affected employee attitudes as to make a fair election impossible.

In the present case, the courts below unanimously held that the present case on its facts was like *Bishop*, and did did not come within the "carefully circumscribed jurisdiction" asserted in *Templeton* and *Surratt* (Pet. 37, 41). Because the National Labor Relations Board in its Brief in Opposition will undoubtedly discuss the nature of the "blocking charge" rule and details of this and the Fifth Circuit cases at greater length, we will not burden the Court with duplicative discussion.[3] It suffices to say,

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[3] Petitioner's objection to the fairness of any delay on processing their decertification petition has also been well answered by the Fifth Circuit:

> It would be particularly anomalous, and disruptive of industrial peace, to allow the employer's wrongful refusal to bargain in good faith to dissipate the union's strength, and then to require a new election which "would not be likely to demonstrate the employees' true, undistorted desires," *N.L.R.B.* v. *Gissel Packing Co.*, 1969, 395 U.S. 575, 611-612, n. 33, since employee disaffection with the union in such cases is in all likelihood prompted by the employer-induced failure to achieve desired results at the bargaining table. * * * By skillful maneuvering, the employer has sapped union sentiments and relegated the union to minority status. [*N.L.R.B.* v. *Big Three*

and the opinions below show, that the Fourth and Fifth Circuits are not in conflict on this issue, but in agreement with each other and the precedents of this Court.

B. Petitioners advance also the more ambitious argument that the federal courts should have jurisdiction under 28 U.S.C. §§ 1331, 1337 and 1361 to consider any otherwise unreviewable action in a representation case before the National Labor Relations Board. See particularly Pet. 28-33. That position, which would simply reverse the procedural scheme of §§ 8, 9 and 10 of the Act, has not been accepted by any appellate court. Significantly, petitioners find it necessary in support of their argument to cite the *dissenting* opinion of Circuit Judge J. Skelly Wright in *Physicians National House Staff Association* v. *Fanning*, —— F.2d ——, 104 LRRM 2940, 2945 (C.A. D.C. *en banc*) (Pet. 24, 32). The Physicians National House Staff Association sought review of this precise issue in No. 80-933, but this Court denied certiorari on February 23, 1981, 49 U.S. L.Wk. 3617. Accordingly, we regard it as unnecessary to comment any further on this issue.

## II. The Petition Is In Material Noncompliance With The Rules Of This Court.

A. The Questions Presented are set forth in the Petition in a manner which honor Rule 21.1(a) of this Court in the breach rather than the observance. The express admonition that the "statement of questions * * * should not be argumentative" is flatly defied. Indeed, the "Questions Presented" are put in declaratory form—rather than in the form of questions—so that the Court is not

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*Industries, Inc.*, 497 F.2d 43, 51-52.] See also *id.* at 52-53, discussing *Franks Bros.* v. *Labor Board*, 321 U.S. 702.

The foregoing takes on special force given the lengthy history of obstinate flouting of the NLRA, and employee rights to organize and bargain collectively thereunder, by the particular employer involved here—J. P. Stevens, Inc.

advised, but is compelled to infer, just what questions are sought to be presented. The argumentative character of the "Questions Presented" is further evidenced by the fact that they are repeated *in haec verba* as the topic headings of the Argument (Pet. 10, 21).

B. Rule 21.1(k)(ii) provides:

> Copies of any other such opinions, orders, findings of fact, and conclusions of law rendered by courts or administrative agencies in the case, and, if reference thereto is necessary to ascertain the grounds of the judgment or decree, of those in companion cases. Each of these documents shall include the caption showing the name of the issuing court or agency and the title and number of the case, and the date of its entry.

This material is omitted entirely from the Petition even though this is an action brought to challenge and set aside an action of an administrative agency, here the NLRB and its Regional Director. References to these opinions, orders, etc., are most emphatically necessary to ascertain the grounds of the challenged decision. It would probably suffice to say that on this point the proposition is intuitively obvious, and that the standard of *Leedom* v. *Kyne*, *supra*, requires a showing which can, in any case, be satisfied only if the Court has before it the precise basis of the Board's action. But petitioners' omission is even more significant because the omitted documents reveal that petitioners actually received the entire relief which they claimed before the Board, so that their present action (and *a fortiori* their petition for *certiorari*) is for that additional reason wholly devoid of merit, if indeed it presents a case or controversy within the Article III jurisdiction of this Court and the courts below.

In considering this point it will be most convenient to track the requirements of § 9(c)(1)(A), the prohibitions of which were allegedly flouted by the Board.

*First*, as to the investigation of the representation petition itself, the Board did precisely what the Act commands it to do. The Board did not dismiss the petition out of hand. Rather, Exhibit B to the Complaint in this action shows that the Board carefully investigated the petition for compliance with the Board's rules, and investigated the signatures accompanying the petition to determine whether a showing of interest had been made. The Regional Director wrote to petitioners' counsel:

> The [petition] . . . has been assigned to an agent who will contact you in the near future.
>
> We acknowledge receipt of *1406 signatures . . .
>
> Enclosed are two copies of a Notice of Employees which the employer has been requested to post.
>
> * * * * *

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* 23 signatures are undated and, by ruling of the Board, cannot be considered as evidence of interest.

No fuller investigation could have been conducted. The Board obviously examined each and every signature, sent petitioners a notice to be posted by the employer and effectively advised them that the petition would be further processed for determining whether there was reasonable cause to believe that a question of representation exists. The investigation prong of the complaint, therefore, presents no live dispute since petitioners secured all of the relief contemplated by § 9(c).

*Second*, as to determining the possible existence of a question of representation, the Board likewise did all that the Act prescribes. Section 9(c)(1)(A) strictly limits the Board's duty to (i) determining ". . . if it has reasonable cause to believe that a question of representation affecting commerce exists," and (ii) providing for an appropriate hearing on the question of representation only after it has found such reasonable cause. The record

unequivocally shows that the Board acted in strict accord with § 9(c)(1). As shown above, the Regional Director advised plaintiffs' counsel on November 29, 1977 that the petition "has been carefully investigated and considered" and that no question concerning representation can exist because the "investigation reveals that there is an unfair labor practice charge pending before an Administrative Law Judge". Petitioners thus obtained precisely what the statute grants them—a determination whether there is reasonable cause to believe that a question of representation exists. The Board made that determination after careful investigation and consideration, and plaintiffs' complaint properly requests nothing more.

The third substantive request for relief—a hearing concerning the question of representation—was contingent upon a finding of reasonable cause, just as the statute requires. Since there was a determination that no reasonable cause exists, the condition was not satisfied and the hearing provision did not come into play.

In short, if the Board's rulings had been reproduced as Rule 21 requires that they be, it would be evident that the Board did everything it was called upon to do, not only by the statute, but by petitioners' own submissions before the Board, where they sought to formulate their demands for relief according to § 9(c)(1)(A). It was not until they brought their complaint in the District Court to challenge the "blocking charge" rule that they reframed the issue in a manner which brought them beyond not only the statute but their prior prayers for relief at the Board. Thus, even if there were any substance to the contention that an unfair labor practice should not block a representation petition, the petitioners would be entitled to no judicial relief since they received from the Board everything for which they had asked.

C. Rule 21.5 of this Court provides:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition.

No comment on our part is necessary to demonstrate that this Rule provides yet another reason for denying the Petition.

## CONCLUSION

For the foregoing reasons and those stated in the Brief in Opposition of the National Labor Relations Board, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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